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October 7, 1994

VIA HAND DELIVERY

Mr. William F. Caton
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

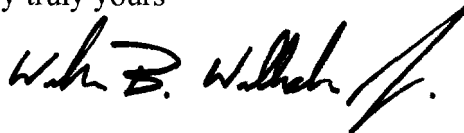
RE: PR Docket No. 94-105

Dear Mr. Caton

Please find enclosed for filing in the above-captioned proceeding an original and four copies of the National Cellular Reseller Association's Response to Oppositions to Request for Access to California Petition to State Regulatory Authority Pursuant to the Terms of a Protective Order.

Please return a file-stamped copy of NCRA's Response with our messenger.

Very truly yours



William B. Wilhelm, Jr.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of)
)
Petition of the People of the State of)
California and the Public Utilities) PR Docket No. 94-105
Commission of the State of California)
Requesting Authority to Regulate Rates)
Associated with the Provision of Cellular)
Service within the State of California)

RESPONSE OF NATIONAL CELLULAR RESELLERS ASSOCIATION TO OPPOSITIONS TO REQUEST FOR ACCESS TO CALIFORNIA PETITION TO STATE REGULATORY AUTHORITY PURSUANT TO THE TERMS OF A PROTECTIVE ORDER

The National Cellular Resellers Association ("NCRA") herewith submits its response to the various oppositions filed with respect to the request of NCRA that the Commission adopt a protective order that would allow parties to the above-captioned proceedings access to redacted material that was submitted by the State of California in its Petition to Retain State Regulatory Authority Over Intrastate Cellular Service Rates.

NCRA is in agreement with and herewith associates itself with the Response of the Cellular Resellers Association, Inc. ("CRA") Cellular Service, Inc. and Comtech Mobile Telephone Company to the Motion of the Cellular Carriers Association of California ("CCAC") to Reject Petition or Alternatively, Reject Redacted Information that was submitted to the Commission on October 4, 1994. In addition, NCRA wishes to add some brief comments regarding the arguments that have been made in opposition to the request of NCRA.

Notwithstanding the attempt to impugn the motives of NCRA, the request which was submitted was designed for the purpose of assuring that this proceeding is conducted in a manner free of prejudicial legal error and which provides all parties with the opportunity to access the relevant data that the Commission must consider. National Black Media Coalition v. FCC, 791 F.2d 1016, 1023-4 (2d Cir. 1986). In this public proceeding, the opportunity to comment upon such data as part of the record to be developed by the Commission may be essential, particularly to the carriers whose data it is and who will be affected by the outcome. Neither NCRA nor its individual members has any desire to obtain confidential data for competitive use and will not use it outside the parameters of this proceeding. Its only purpose in filing the motion was to make certain that no parties to the proceeding would be able to argue that the Commission's consideration of the California petition was procedurally flawed or that the State of California should not be permitted to present relevant data to the Commission in support of its argument to retain state regulatory authority.

As NCRA feared, however, it is clear that the California carriers would like to build potential error into this proceeding or see the Commission dismiss the California petition without any consideration on the merits because California has submitted confidential material. Such gamesmanship in the service of ridding themselves of state rate regulation and without allowing the Commission or the State of California a fair opportunity to discharge their respective statutory responsibilities can not be allowed.

The obvious, common sense, and practical manner of satisfying all interests in these circumstances is the adoption of a protective order that would make the confidential information available to all parties while precluding its possible misuse under the terms of the protective order. The Commission's draft protective order which was distributed by the staff and upon which comment has been requested by Friday, October 7, 1994, accomplishes this. The protective order should be adopted in its basic form with such minor amendments as may be appropriate based upon the comments of interested parties who have been requested to submit their views. NCRA would not object to any additional reasonable provisions that would further prevent misuse of the data or its release or use for unfair competitive advantage.

The argument of some of the carriers that NCRA should have filed a Freedom of Information Act request is a thinly disguised effort to inject unnecessary procedural complexities into what is essentially a simple matter. It is not clear that access to the information may be obtained under the Freedom of Information Act since Exemption 4 protects the kind of data that the carriers now wish not to have disclosed. While urging that NCRA should have filed a FOIA request, at the same time, they urge that the data is confidential. They would undoubtedly argue that Exemption 4 precludes the Commission from making the data public. Moreover, the FOIA contains no provisions for a practical compromise through the adoption of protective orders that would make the data available to a small class of people whose need to access the information is apparent.^{1/} The clear legal

^{1/} The Commission itself has recognized "the critical importance of the Protective Order in facilitating prompt access to voluminous materials, many of which undoubtedly could be withheld from public inspection under Exemption 4 of the Freedom of Information Act." In re Applications of Craig O. McCaw and AT&T for Consent to the Transfer of Control, Memorandum Opinion and
(continued...)

rationale under which this data must be made available under protective order stems from the fact that the request of the State of California to retain regulatory authority is being conducted under the provisions of Section 332 of the Communications Act as well as the general procedural requirements of the Administrative Procedure Act.^{2/} Both relevant statutory provisions require public participation in this proceeding. Such public participation can not meaningfully be carried out unless access to the information is obtained. National Black Media Coalition, 791 F.2d at 1023-4. At the same time California should not be precluded from submitting information which it believes is relevant to the Commission's disposition of its request for fear that certain parties would object to the use of relevant information to dispose of important public interest questions now before the Commission.

^{1/} (...continued)

Order, File ENF-93-44, ¶ 167 (released September 19, 1994). In this and other proceedings, the Commission has consistently protected confidential data while allowing for meaningful participation through the release of information pursuant to a protective order. The Commission has previously sanctioned the use of protective orders to avoid what the Commission itself characterized as a "massive undertaking and the inevitable disputes over our determinations [which] would have precluded disclosure in any reasonable time frame" had it adopted the balancing test suggested by other parties. Id.

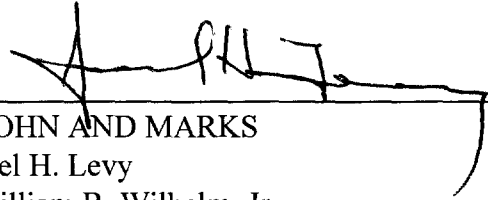
^{2/} 47 U.S.C. §§ 332(c)(3)(A),(B); 5 U.S.C. § 553(c); Abbott Laboratories v. Young, 691 F. Supp. 462, 467 (D.D.C. 1988), remand 920 F.2d 984 (1990), cert. denied Abbott Laboratories v. Kessler 112 S. Ct. 76 (1991); Home Box Office v. FCC, 567 F.2d 9, 51-58 (D.C. Cir 1977), cert denied 434 U.S. 829; Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied; Portland Cement Corp. v. EPA, 417 U.S. 921 (1974).

WHEREFORE, the request of NCRA should be granted and an appropriate protective order adopted by the Commission governing the consideration of the California petition and any other further pleadings that are filed in connection therewith.

Respectfully submitted

NATIONAL CELLULAR RESELLERS
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By



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October 7, 1994

CERTIFICATE OF SERVICE

I, Shevry Davis, do hereby certify that true copies of the foregoing "Response of National Cellular Resellers Association to Oppositions to Request for Access to California Petition to State Regulatory Authority Pursuant to the Terms of a Protective Order" were sent this 7th day of October, 1994, by first-class U.S. mail, postage prepaid, to the following:

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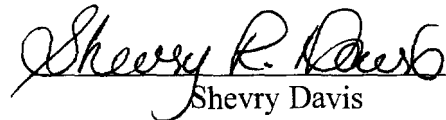
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